No. 77-1243

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

HOMER E. DETRICH, Director, San Diego County Department of Public Welfare,

Petitioner,

v.

SHELDON G.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

DONALD L. CLARK, County Counsel
County of San Diego
LLOYD M. HARMON, JR., Chief Deputy
BY D. RICHARD RUDOLF, Deputy, and
WILLIAM J. SCHWARTZ, JR., Deputy
355 County Administration Center
San Diego, California 92101
(714) 236-3651
Attorneys for Petitioner

February 28, 1978

ARTS & CRAFTS PRESS, SAN DIEGO, CALIF.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

IN RE TRICIA MARIE M.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Petitioner Homer E. Detrich, Director of the San Diego County Department of Public Welfare, a licensed adoption agency, respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Fourth Appellate District, Division One entered herein on October 18, 1977.

OPINION BELOW

The order of the California Supreme Court denying hearing (Appendix A) is reported at page 8 of the Minutes in the California Official Reports Advance Sheets, Number 1 (January 10,

1978). The opinion of the California Court of Appeal, Fourth Appellate District, Division One, (Appendix B) is officially reported as *In re Tricia M.* (1977) 74 Cal.App.3d 125.

JURISDICTION

The decision of the Court of Appeal was entered October 18, 1977. The order of the California Supreme Court denying hearing was entered December 15, 1977. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Do the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution require that an unwed father, who has not legitimated his biological child, be given a custody hearing before he can be denied the power to prevent the adoption of his biological child?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution.

Legislative acts of the California Legislature involved are: California Civil Code Sections 196a, 197, 224, 4600, 7004 and 7017; California Evidence Code Section 621; and California Probate Code Section 255, all of which are set forth in Appendix C.

STATEMENT OF THE CASE

On October 23, 1975 Tricia Marie M. was born in Oceanside, California, out of wedlock. Respondent, the child's biological father, had a casual sexual relationship with the child's mother who became pregnant with Tricia at the inception of their rela-

tionship. Four months after being advised of her pregnancy, respondent refused to marry the mother, terminated their weekend liaisons, and, upon his discharge from the Marine Corps, returned to the home of his mother in Pennsylvania.

The mother relinquished the child to Petitioner's agency, for adoption, on March 1, 1976. On July 9, 1976, petitioner filed a Petition to Terminate the Rights of the Natural Father (hereinafter referred to as a TROF) under California Civil Code Section 7017[1] to terminate the rights of the biological father and obtain an order that only the mother's consent was required for the adoption of Tricia. Section 7017, provides in relevant part:

> "(b) If a mother relinquishes or consents to or proposes to relinquish for adoption a child who does not have (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding and the alleged father, if any, has not, in writing, denied paternity, waived his right to notice, voluntarily relinquished or consented to the adoption, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition, in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court."

Summons was issued and the TROF Petition set for hearing on September 2, 1976. Respondent, Sheldon Donald Greene, the biological father, filed an Answer, and a Cross-Complaint for sole custody of the child, on August 27, 1976. The Answer alleged he was a presumed natural father and entitled to custody. The

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[1] Unless otherwise indicated, all statutory references hereinafter are to the California Civil Code.

Cross-Complaint was not at issue, and was taken off calendar by respondent, when the TROF Petition was heard on September 2, 1976.

The trial court held that respondent was not a "presumed natural father" as defined by the California version of the Uniform Parentage Act,[2] and that consequently his consent to Tricia's adoption was not required. The court reasoned that the proceeding, under Section 7017(d), was one to determine whether or not respondent was a presumed natural father. Section 7017(d) provides, in relevant part:

> "(d) If . . . the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f). If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. *If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of 7004,* then *the court shall* issue an *order* providing *that the father's consent shall be required for* an *adoption* of the child. *In all other cases, the court shall* issue an *order* providing *that only the mother's consent shall be required for* the *adoption* of the child." (Emphasis added.)

The trial court held that since Respondent did not prove he was a presumed natural father, it was unnecessary to inquire further

[2] The California statutes (Civ. Code Secs. 7000 et seq.) do not correspond exactly to the Uniform Parentage Act as proposed by the National Conference of Commissioners on Uniform State Laws. See discussion, *infra,* at page 6. In the Uniform Parentage Act, no distinction is made between natural (biological) fathers and "presumed natural fathers."

as to his fitness to have custody of Tricia under Section 4600.[3]

On April 1, 1977, the Cross-Complaint for sole custody came on for hearing in the Superior Court and that court took the matter off calendar, ruling Respondent was attempting to relitigate the same factual and legal questions determined against him by the September 2, 1976 judgment in the TROF proceeding.

On October 18, 1977, the Court of Appeal, Fourth Appellate District, Division One, held that Section 7017(d) must be interpreted *as a matter of constitutional law* to place custody at issue in all TROF proceedings. The Court of Appeal reasoned that the United States Constitution, as interpreted in *Stanley* v. *Illinois* (1972) 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 required the extension of all parental rights to all biological fathers, regardless of the relationship, or lack thereof, between the father and the child or its mother. Accordingly, it ruled the TROF hearing was not one to determine respondent's status, but that inquiry into the biological father's fitness and detriment to the child under Section 4600 was required merely because the father appeared and requested custody, and reversed the judgment for further proceedings.

Petitioner's Petition for Hearing in the California Supreme Court was summarily denied on December 15, 1977. This petition is timely filed within 90 days of that date.

REASONS FOR GRANTING THE WRIT

A hearing is sought to review the important question whether the due process and equal protection clauses of the Fourteenth Amendment require that a mere biological father must be given

[3] Section 4600 entitles a "parent" to a fitness hearing before custody can be taken from him, in any proceeding where custody is at issue.

a custody hearing before he can be denied the right to block the adoption of a child otherwise available for adoption, in light of this Court's decisions in *Stanley* v. *Illinois, supra,* and *Quilloin* v. *Walcott* (1978) ..... U.S. ....., 54 L.Ed.2d 511, 98 S.Ct..... Reversal of the decision of the Court of Appeal is required to avert the frustration of the substantial public purpose of promoting stable placement and early adoption of children.

Petitioner contends that the pertinent California statutes comport with the constitutional requirements of due process and equal protection enunciated in the *Stanley* and *Quilloin* cases. The decision of the California Court of Appeal, relying primarily on the *Stanley* decision, improperly concluded that the Constitution requires that Section 7017 be construed to extend parental rights to mere biological fathers (including rapists, sperm donors, and men who may have but a single sexual adventure with a woman) equal to those rights extended to presumed natural fathers, as defined by Section 7004.

Generally speaking, under California law a child born in wedlock cannot be adopted without the consent of each living parent who has not voluntarily surrendered rights in the child or been judicially deprived of the custody and control of the child (Sec. 224; also see Secs. 232 et seq.). In contrast, only the consent of the mother is required for adoption of an illegitimate child, unless the biological father establishes that he is a presumed natural father, *i.e.,* has legitimated his child (Secs. 224 and 707(b)).[4]

[4] Technically the concept of "legitimacy" no longer exists under the California statutes since January 1, 1976. The distinction formerly made between legitimate and illegitimate children as it pertains to the rights of fathers to block the adoption and have the custody of their children was carried through by the definition of "presumed natural father." (See Sections 197, 224 and 7004 and Probate Code Section 255.)

Thus, California law recognizes that unless and until the child is legitimated, the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives. A presumed natural father is defined by Section 7004 as follows:

> "(a) *A man is presumed to be the natural father of a child if he meets the conditions* as set forth in Section 621 of the Evidence Code or *in any of the following subdivisions:*
>
> "(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.
>
> "(2) *Before the child's birth,* he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, *and,*
>
> "(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or
>
> "(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination or cohabitation.
>
> "(3) *After the child's birth,* he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, *and*
>
> "(i) With his consent, he is named as the child's father on the child's birth certificate, or
>
> "(ii) He is obligated to support the child under a written voluntary promise or by court order.
>
> "(4) *He receives the child into his home and openly holds out the child as his natural child.*
>
> "(b) Except as provided in Section 621 of the Evidence

> Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man." (Emphasis added.)

California Evidence Code Section 621 provides:

> "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

In short, the California Legislature has weighed and balanced the competing interests between the child, the natural mother, the biological father, the prospective adoptive parents, and the state, and has determined that a bona fide human relationship must exist between the child or its mother and the biological father before the biological father may acquire veto power over the adoption of his natural child. Requiring the biological father *at least* to receive his child into his home and openly hold the child out as his own, (all that is required under Section 7004 (a)(4), the only provision potentially applicable to respondent) before being treated as a parent, is a reasonable and appropriate exercise of legislative power. It is a statutory scheme "carefully tuned to alternative considerations" as required by this Court in *Trimble v. Gordon* (1977) ..... U.S. ....., 52 L.Ed.2d 31, 97 S.Ct. 1459.

The California statutes provide biological fathers with due process. They cannot be deprived of whatever contingent parental rights they have without notice and opportunity to be heard on whether they are presumed natural fathers (§ 7017(b) and

(d)). Respondent had such an opportunity to present evidence to establish such status. The trial court concluded the respondent was not a presumed natural father, and therefore, lacked authority to block the adoption of Tricia.

Although invested with lesser substantive rights than those of presumed natural fathers, the classification of mere biological fathers also comports with equal protection requirements. Differentiation between the classes is based on the objective absence of any real, human, "parent" relationship with the child. Respondent never has had custody of Tricia, and has *no* relationship with her. Like so many other fathers of children born out of wedlock, respondent preferred to satisfy other interests in his life and leave the parenting of Tricia to her mother. She decided it would be in the best interests of Tricia to be adopted.

Tricia should be protected from the veto power over her adoption wielded by a biological father who, prior to commencement of the TROF proceeding, had taken no steps to create any relationship with her. This Court has recently upheld Georgia statutes which give fathers of legitimate children authority to veto an adoption without giving that same veto authority to fathers of illegitimate children (*Quilloin* v. *Walcott, supra*). That distinction was based on the reality that mere biological fathers never shoulder "any significant responsibility with respect to the daily supervision, education, protection, or care of the child." (*Quilloin* v. *Walcott, supra,* 54 L.Ed.2d at 520.)

CONCLUSION

The California Supreme Court and the California Court of Appeal did not have the benefit of the *Quilloin* case at the time each court considered the circumstances of this case. Clearly, the Court of Appeal misread the reach of the *Stanley* case in concluding that as a matter of constitutional law, custody is an issue in a TROF proceeding involving a mere biological father who has not established his status as a presumed natural father.

The unnecessary vesting of the rights of real parents in mere biological fathers will wreak havoc in the lives of otherwise adoptable children. Substantial delays in many adoptions, if not total frustration, will occur unless the decision of the Court of Appeal is reversed. This Court should now explicitly clarify the effect of the *Quilloin* decision on the broad language of the *Stanley* case. The factual realities recognized by Chief Justice Burger in his dissenting opinion in the *Stanley* case are as true now as they were then:

> "Furthermore, I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification whose objective is not to penalize unwed parents but to further the welfare of illegitimate children in

> fulfillment of the State's obligations as parens patriae." (*Stanley* v. *Illinois, supra,* 405 U.S. at 665-666, 31 L.Ed.2d at 567, footnote omitted.)

It is respectfully urged that this Court grant the Petition for Certiorari.

DATED: February 28, 1978

Respectfully submitted,
DONALD L. CLARK, County Counsel
County of San Diego
LLOYD M. HARMON, JR., Chief Deputy

BY_____
D. RICHARD RUDOLF, Deputy, and
WILLIAM J. SCHWARTZ, JR., Deputy
Attorneys for Petitioner

APPENDIX A

APPENDIX A

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102
DEC. 15, 1977

I have this day filed Order—

HEARING DENIED

In re: 4 Civ. No. 16287.
In re Tricia Marie M.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX B

APPENDIX B

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

In the Matter of the Petition to Terminate the Rights of the Father, Sheldon G. to his child, TRICIA MARIE M., a minor.	**4 Civ. No. 16287 (Superior Court No. 384486)**

APPEAL from an order of the Superior Court of San Diego County. Eli H. Levenson, Judge. Reversed with directions.

Legal Aid Society of San Diego, Inc., by Roy L. Landers and Dennis E. Holz, for Father and Appellant.

Donald L. Clark, County Counsel, by D. Richard Rudolf, Deputy, for Petitioner and Respondent.

The Director of the San Diego County Department of Public Welfare, a licensed adoption agency, filed this action under Civil Code section 7017(b) to terminate the rights of Sheldon G., the "natural father," and to secure an order that only the consent of the natural mother is required for adoption. Sheldon answered the petition and cross-complained seeking custody of Tricia. The trial court entered judgment finding Sheldon was not the presumed natural father of his child and ordered the mother's consent alone would be required for adoption. Sheldon appeals.

In December 1974 Sheldon G., then 17 years old and serving in the Marine Corps at Camp Pendleton, met Kathleen Susan T.

(Kathy) at the apartment of a friend in Oceanside. She lived with her mother in Whittier and met Sheldon on weekends in Oceanside where they had sexual relations. They never lived together as man and wife.

In February 1975 Kathy became pregnant and advised Sheldon. They continued their close personal relationship until June 1975 but he refused to marry her. He was discharged from the Marines in July 1975 and returned to his home in Philadelphia, Pennsylvania, where he sought employment. He did not ask Kathy to accompany him. Tricia M. was born in Oceanside on October 23, 1975.

It is conceded by all parties that Sheldon is the natural father of Tricia. Sheldon acknowledged this before the birth and has continued to do so at all times. Immediately before and for some time after Tricia's birth, Kathy lived with Jesse M., age 26, who allowed his name to be inserted on the birth certificate as father but denied he was the real father. Jesse gave his consent to the adoption and is not a party to this proceeding.

After his departure from California, Sheldon wrote Kathy a number of times and once sent some baby clothes and toys for the child. He asserts he sent her money from his unemployment check but she denied receiving it. Although he made arrangements for Kathy and the child to go to Philadelphia so they would be near him, he did not offer to marry Kathy nor did he offer to take the child from her because, he said, the child would be better off with the mother. Kathy never went to Pennsylvania.

Tricia was placed in a foster home on November 18, 1975. She was removed by the mother on December 30, 1975, but returned three days later. On January 8, 1976 she was again taken from the home and on January 12 she was returned. On February 16 Kathy again took the child. Between February 18 and 22 the child was in the hospital and on the 22nd discharged to the county. On March 1, 1976, Kathy signed the papers relinquishing the child for adoption.

A county Child Placement and Protective Service worker said Kathy once told her Sheldon denied paternity and abandoned her when she was about two and one-half months pregnant. Initial inquiry with several identification agencies and a letter to Sheldon at Camp Pendleton failed to reveal Sheldon's current address. The record does not disclose why Kathy did not provide the information but when Sheldon learned of the proposed relinquishment for adoption he contacted an attorney who immediately wrote the county seeking custody of Tricia. His letter was brought to the attention of the Director who initiated this action.

Sheldon has consistently taken the position he does not want to marry Kathy and if Kathy does not want to keep Tricia, he wants the child. He lives with his mother, 37, who is a teacher's assistant in Philadelphia and contends as the natural father he should be given custody. He asserts he can provide Tricia a good home.

The status of children born out of wedlock has been elevated in recent years both socially and legally.[1] The common law doctrine of *filius nullius,* the son of no one, a non-entity, has given way, though ever so slowly, to a more enlightened appreciation of the rights of individuals unfettered by the social mores of another age. In 1968 the United States Supreme Court rendered two opinions, *Levy v. Louisiana,* 391 U.S. 68 [88 S. Ct. 1509] and *Glona v. American Guarantee & Liability Ins. Co.,* 391 U.S. 73 [88 S. Ct. 1515], asserting illegitimate children are not non-persons. They are humans, live and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. The cases struck down the Louisiana wrongful death law which denied recovery by non-marital children of the deceased mother. Children were entitled to equal protection under the law and it was wrong to discriminate against those born out of wedlock.

In 1972 the Supreme Court ventured deeper into this area in *Stanley v. Illinois,* 405 U.S. 645 [92 S. Ct. 1208] which was hailed by writers as recognizing for the first time the rights of the putative father.

In *Stanley* the father had never married the mother of his children although they lived together intermittently and he held the children out as his own. When the mother died the children were taken from him pursuant to Illinois law and became wards of the state. The United States Supreme Court held: (1) The

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FOOTNOTE 1: See generally H. Krause, Illegitimacy, Law and Social Policy (1971).

natural father was entitled to a hearing on his fitness as a parent before the children could be taken from him and the fact the state can apply for adoption or for custody and control of his children does not bar his attack on the dependency proceeding. The state cannot, consistently with due process requirements, merely presume that unmarried fathers in general and this petitioner in particular, are unsuitable and neglectful parents. Parental unfitness must be established on the basis of individualized proof. (2) The denial to unwed fathers of a hearing on fitness accorded to all other parents whose custody of their children is challenged by the state constitutes a denial of equal protection of the laws.

Mr. Justice White, writing for the Court in *Stanley* set out some basic concepts in this area:

> "The rights to conceive and to raise one's children have been deemed 'essential,' [citation], 'basic civil rights of man,' [citation], and '[r]ights far more precious . . . than property rights,' [citation] 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' [Citation.] The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, [citation], the Equal Protection Clause of the Fourteenth Amendment, [citation], and the Ninth Amendment, [citation].
> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony . . . . [Citations.] 'To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.' [Citation.]" (*Stanley v. Illinois,* 405 U.S. 645, 651-652 [92 S. Ct. 1208, 1212-1213].)

About this same time the United States Supreme Court reported *Rothstein v. Lutheran Social Services, etc.,* 405 U.S. 1051 [92 S. Ct. 1488] returning it to the Wisconsin Supreme Court to reconsider in light of *Stanley v. Illinois, supra,* 405 U.S. 645. *Rothstein* involved a completed adoption contested by the putative father. The state court had held that relevant Wisconsin

statutes grant the mother alone the power to terminate parental rights and to consent to adoption of any child born out of wedlock. The state court had held that failure to grant parental rights or notice of hearing to the putative father did not violate the equal protection clause of the Fourteenth Amendment.

It is in this light that the Commission on Uniform State Laws proposed, and California 1975 adopted, the Uniform Parentage Act[2] (Act) and we are here called upon to review its terms as applied by the court below.

Sheldon's status as a natural father is not questioned by the Director and is affirmed by the court's order.[3] The court determined on the evidence presented Sheldon was not a "presumed natural father" as defined by the statute and therefore his rights of parentage had to be terminated and an appropriate order made that his consent was not required for the adoption. No other issue was put in focus and the court specifically rejected the contention it had before it a question which would relate to custody or what was in the best interests of the child.

The Act provides the "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes certain rights, privileges, duties and obligations (Civ. Code §7001). It is significant the Legislature then affirmed the parent and child relationship extends equally to every child and to every parent regardless of the marital status of the parties and at the same time it abolished the incidents of illegitimacy under the older law (Civ. Code §200, et seq.). The Act then sets out the method of legally establishing the existence of a parent and child relationship (Civ. Code §7003).

FOOTNOTE 2: The state law (Civ. Code §7000 et seq.) does not correspond exactly to the commission's recommendation. See Krause, Uniform Parentage Act, 8 Family Law Quarterly 1, 14 et seq., for discussion of the uniform act draft.

FOOTNOTE 3: The court's order recites, "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the rights of Sheldon . . . to *his* child, Tricia Marie M., are terminated and that only the mother's consent shall be required for the adoption of said minor." (Emphasis added.)

The Act creates certain rebuttable presumptions to support proof the man is the natural father of a child.

"§7004. (a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

"(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

"(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

"(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

"(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

"(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

"(i) With his consent, he is named as the child's father on the child's birth certificate, or

"(ii) He is obligated to support the child under a written voluntary promise or by court order.

"(4) He receives the child into his home and openly holds out the child as his natural child.

"(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man."

Thus, in order to come within one of the section 7004(a) presumptions numbered 1, 2 and 3 the man seeking to establish himself as a presumed natural parent is required to prove a marriage or an attempted marriage. Only presumption number 4 applies to the man who cannot produce evidence of some real or attempted marriage relationship. These are presumptions, none of which is conclusive, and it is apparent natural parentage can be established without resort to any presumption.

In the instant case the parties agree Sheldon is the natural father of Tricia so resort to a presumption is not required to establish parenthood. The Act, however, makes a distinction between "natural father" and "presumed father" for other purposes. These are words of art and must be differentiated particularly in adoption cases under section 7017. In an adoption matter an effort must be made to identify the natural father and give him notice and an opportunity for a hearing on custody and the determination of his status as a "presumed . . . father" as the phrase is defined in section 7004(a) before a court issues an order stating the mother's consent alone is required to complete the adoption. This procedure complies with the due process and equal protection requirements of *Stanley v. Illinois, supra,* 405 U.S. 645.

Civil Code section 7017(c) and (d) reads as follows:

"(c) In an effort to identify the natural father, the court shall cause inquiry to be made by the State Department of Health, a licensed county adoption agency, or the licensed adoption agency to which the child is to be relinquished of the mother and any other appropriate person. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child. The department or the licensed adoption agency shall report the findings to the court.

"(d) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f). If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child."

Keeping in mind the distinction between the "natural father" and the "presumed father" we turn first to the sentence, "If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage[4] and custodial rights in whatever order the court deems proper." It is apparent the Legislature intended in adoption cases to give the court authority to consider custody *before* reaching an ultimate conclusion of parentage. The reason for this discretion becomes apparent when one considers the concern so often expressed by the writers in this field that a natural father worthy of and desiring custody but who resists marriage may be blocked in his efforts to obtain custody just because the mother refuses to permit him the opportunity to have the child in his family. By the same token the natural father who has shown no previous interest in providing a family atmosphere for his child should not be allowed to withhold consent and block a speedy adoption which would be in the child's best interests unless he can show his action will now result in a custodial arrangement serving the best interests of the child.

FOOTNOTE 4: The word parentage here can only be interpreted as referring to whether the person holds either the status of natural father or the status of presumed father.

The resolution of this quandary is to be found in the next sentence of the section. The language then in effect provides only the "presumed father," namely one who has married the mother, attempted to effect a marriage or received the child into his home and openly held the child out as his own natural child, has done enough more than simply provide genesis for the child to warrant right to withhold consent to an adoption. In such a case the burden shifts to the person seeking to take custody from him and requires proof of some conduct on his part justifying termination of his parental rights.[5] Where the mother has frustrated the natural father's efforts to hold the child out as his, the court may, in a proper case, first grant him custody, allow him to complete the conduct necessary under section 7004(a)(4) to establish himself as a presumed father, and then make the appropriate order.

A discussion of this problem can be found in a well written article in 28 Hastings Law Journal (1976) 191, 217-218, 221-222:

". . . a narrow application of the statute could potentially leave the unwed father who has not become a presumed father under section 7004(a) in virtually the same unfavorable position he occupied before enactment of the Uniform Act. However, the statute does afford the courts a method of alleviating the problem where justice requires. As pointed out, the court has the power to determine parentage and custodial rights in whatever order it deems proper. Therefore, to protect the rights of the unwed father who can demonstrate both his paternity and his fitness to assume custody, the court may award custody to him. This would allow him to accomplish legitimation

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FOOTNOTE 5: Civil Code section 197 confers on a presumed father a right to custody equal in stature to the custodial right of the mother. Section 197 provides: "The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (c) of Section 7004, is equally entitled to the custody, services and earnings of the unmarried minor. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings."

under section 7004(a)(4) and render him a presumed father. His consent would then be required before his child could be released for adoption.

". . . . . .

"Under the procedural provisions of the new Civil Code section 7006, a putative father's consent to adoption of his child is required only if he can establish that he is a presumed father —i.e., that he is or was married to the child's mother or that he has 'legitimated' the child by acknowledging it and accepting it into his home. To avoid foreclosing the rights of putative fathers who have not been able to become 'presumed' fathers, but who are nevertheless fit to assume custody, the court may determine custodial rights prior to deciding the issue of parentage. By awarding custody to the putative father, the court can allow him to legitimate the child, thus equalizing his rights in the adoption procedure with those of the child's mother.

"The importance of the adoption system in providing secure and loving home environments for children whose natural parents cannot or do not wish to raise them is obvious. However, in our rush to insure the stability and efficiency of the adoption process, it is apparent that the rights of the parties involved—particularly the unwed father—may well suffer. It may be instructive in this regard to consider the growing awareness of adopted children who have undertaken to search for their 'real' parents in an attempt to discover their familial roots. Would it not be fairer to all of the parties in an adoption proceeding to ensure that the rights of the putative father who wants to assume custody of his child and is adjudged qualified to do so are protected? After all, it makes no more sense to insist that all unwed fathers are disinterested and unfit parents than it does to continue in the belief that all mothers are by nature interested in raising children.

"It is to be hoped that courts will weigh these considerations in determining adoptions issues." (28 Hastings L.J. 217-218, 221-222.)

The concept was reiterated in *Adoption of Rebecca B.*, 68 Cal. App. 3d 193, 198, footnote 4:

"Under the Uniform Parentage Act (§ 7000 et seq.; Stats. 1975, ch. 1244, § 11, effective Jan. 1, 1976), a man not the presumed father of a child under section 7004, subdivision (a), but alleging himself to be the father, may bring an action to determine the existence of the father and child relationship (§ 7006, subd. (c)). The resulting judgment or order of court may make provision for any matter in the best interests of the child including support, custody, guardianship and visitation privileges (§ 7010, subd. (c)). *Thus the judgment may provide the opportunity for the alleged natural father to qualify as the presumed father under section 7004, subdivision (a)(4).* Section 7017 spells out the rights of a presumed father with respect to a child in the situation where the mother 'relinquishes or consents to or proposes to relinquish [the child] for adoption. . . .'" (Emphasis added.)

Under these conditions we observe full compliance with *Stanley v. Illinois, supra,* 405 U.S. 645, both as to due process as well as equal protection.

In the instant case custody was sought by Sheldon and it is apparent from the record he was foreclosed from offering evidence on that issue.[6] In a petition to set aside the judgment the matter of custody and the best interests of the child were specifically raised by Sheldon for a second time and rejected as in-

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FOOTNOTE 6: No evidence was received on the issue of custody. At the first hearing the court made the following observation:

"THE COURT: That's right. When you say his consent, his consent is not required for adoption, then what you're actually saying is, he's not entitled to any right as far as that child is concerned, custodial or otherwise.

"MR. LANDERS: That's the way it appears, but it certainly isn't right.

"THE COURT: I disagree with that. As I say, I think there's something a little bit shaky in the logic where you have facts, marginal facts, if you want to put it that way—at least where a man says, I have tried to do this, tried to do that, I could have put myself into a presumed situation but I was prevented from doing so—that is the area which makes it an injustice, really, but

(This footnote is continued on next page)

appropriate by the trial court.[7] The matter of custody was a proper subject for the court to consider[8] and it was error to limit the consideration to whether this natural father was *at that time* a "presumed father" as defined. If Sheldon is found to be a proper person to have custody of the child, he could then qualify himself as the "presumed father" before the proceeding was completed and appropriate orders made. If not, the issues could then be fully resolved as the court did in this case.

". . . . . .

"THE COURT: I don't think the matter of the best interests of the child is before me. The question is whether or not the presumed natural father is entitled to certain rights, that's all, and we don't look at what is to the best interest in this proceeding, as I recall it. It may well be when we get to an adoption or

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I don't think it has been taken care of in the statute.

"I think we can agree on the facts. There's no question about the facts and I'm assuming now for the sake of your appeal—and I hope you do—that this man is the natural father—he has stated so under oath—that this man has attempted to contact the natural mother from time to time, that this man did take steps to go before the authorities in Philadelphia to see if he could obtain rights, thinking that the natural father had the right. I still don't think any of those things bring him within 7004(a) which makes me rule as I'm ruling. Do you see what I mean?"

FOOTNOTE 7: In the second hearing the court said:

"THE COURT: The fact that bothered me and I think bothered counsel at the time was the word 'presumed' in there. We are talking about an actual natural father. By his own statement he stated he was the natural father and there was nothing to indicate otherwise. So the question arises as to whether or not we have to give any consideration to the word 'presumed'. What are the rights of a natural father?

FOOTNOTE 8: The clear language of Civil Code section 7017 (d) requires the court to determine custodial rights in this proceeding when claimed. This may not be an exclusive remedy but it is a right available to him in addition to any other procedures (see e.g. § 7006(c)).

some other proceedings, then I may have to see whether or not the best interests of the child are to be considered in terms of whether it should be adopted or not adopted, et cetera. This is the first move. . . ."

We find no reason to discuss at this time the law applicable to custody proceedings except to cite Civil Code section 4600 and relevant case law, more specifically *In re Richard M.,* 14 Cal. 3d 783; *In re Rebecca B., supra,* 68 Cal. App. 3d 193; and *In re Reyna,* 55 Cal. App. 3d 288.

Judgment reversed with directions to the trial court to hold further hearings consistent with this opinion.

CERTIFIED FOR PUBLICATION

Cologne, J.

WE CONCUR:

Brown P. J.

Rosado J.*

*San Diego County Superior Court Judge sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX C

APPENDIX C

Civil Code § 196a.

The father as well as the mother of a child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in benalf of a minor child and in such action the court shall have power to order and enforce performance thereof, the same as in a suit for dissolution of marriage.

Civil Code § 197.

The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (a) of Section 7004, is equally entitled to the custody, services and earnings of the unmarried minor. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings.

Civil Code § 224.

A child having a presumed father under subdivision (a) of Section 7004 cannot be adopted without the consent of its parents if living; however, if one parent has been awarded custody by judicial decree, or has custody by agreement of the parents, and the other parent for a period of one year willfully fails to communicate with and to pay for the care, support, and education of such child when able to do so, then the parent having custody alone may consent to such adoption, but only after the parent not having custody has been served with a copy of a citation in the manner provided by law for the service of a summons in a civil action that requires him or her to appear at the time and place set for the appearance in court under Section 227; failure of a parent to pay for the care, support and education of such child for such period of one year or failure of a parent to communicate with such child for such period of one year is prima facie evidence that such failure was willful and without lawful excuse; nor a child with no presumed father under subdivision (a) of

Section 7004 without the consent of its mother if living; except that the consent of a father or mother is not necessary in the following cases:

1. When such father or mother has been judicially deprived of the custody and control of such child (a) by order of the court declaring such child to be free from the custody and control of either or both of his parents pursuant to Chapter 4 (commencing with Section 232) of Title 2 or Part 3 of Division 1 of this code, or (b) by similar order of the court of another jurisdiction, pursuant to any law of that jurisdiction authorizing such order; or when such father or mother has, in a judicial proceeding in another jurisdiction, voluntarily surrendered his right to the custody and control of such child pursuant to any law of that jurisdiction provided for such surrender.

2. Where such father or mother of any child has deserted the child without provision for its identification.

3. Where such father or mother of any child has relinquished such child for adoption as provided in Section 224m; or where such father or mother has relinquished such child for adoption to a licensed or authorized child-placing agency in another jurisdiction pursuant to the law of that jurisdiction.

Civil Code § 4600.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent according to the best interests of the child.

(b) To the person or persons in whose home the child has

been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

Civil Code § 7004.

(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage

solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

Civil Code § 7017.

(a) If a mother relinquishes or consents to or proposes to relinquish for adoption a child who has (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221), Title 2, Part 3, Division 1 of the Civil Code, unless the father's relationship to the child has been previously terminated or determined by a court not to exist or the father has voluntarily relinquished or consented to the adoption of such child.

(b) If a mother relinquishes or consents to or proposes to relinquish for adoption a child who does not have (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding and the alleged father, if any, has not, in writing, denied paternity, waived his right to notice, voluntarily relinquished or consented to the adoption, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court.

(c) In an effort to identify the natural father, the court shall cause inquiry to be made by the State Department of Health, a licensed county adoption agency, or the licensed adoption agency to which the child is to be relinquished of the mother and any other appropriate person. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child. The department or the licensed adoption agency shall report the findings to the court.

(d) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f). If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child.

(e) If, after the inquiry, the court is unable to identify the

natural father or any possible natural father and no person has appeared claiming to be the natural father and claiming custodial rights, the court shall enter an order terminating the unknown natural father's parental rights with reference to the child.

(f) Notice of the proceeding shall be given to every person identified as the natural father or a possible natural father in accordance with the provisions of the Code of Civil Procedure for the service of process in a civil action in this state, provided that publication or posting of the notice of the proceeding shall not be required. Proof of giving the notice shall be filed with the court before the petition is heard. However, if a person identified as the natural father or possible natural father cannot be located or his whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to such person.

Evidence Code § 621.

Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

Probate Code § 225.

(a) The rights of succession by a child, as set forth in this division, are dependent upon the existence, prior to the death of the decedent, of a parent and child relationship between such child and the decedent.

(b) The rights of succession by issue through a deceased child of a decedent, as set forth in this division, are dependent upon the existence, prior to the death of the deceased child, of a parent and child relationship between such issue and a deceased child and upon the existence prior to the death of the decedent or the deceased child of a parent and child relationship between such deceased child and the decedent.

(c) The rights of succession to a child's estate by a parent and all persons who would take an intestate share of the decedent's estate through such parent, as set forth in this division, are dependent upon the existence, prior to the death of the de-

cedent, of a parent and child relationship between the parent and the decedent child.

(d) For purposes of this division, a parent and child relationship exists where such relationship is (1) presumed and not rebutted pursuant to, or (2) established pursuant to, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

IN RE TRICIA
MARIE M.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to each of the following named persons:

MICHAEL R. VALENTINE
DENNIS HOLZ
Legal Aid Society of
San Diego, Inc.
110 N. Ditmar
Oceanside, CA 92054

CLERK OF THE COURT
Court of Appeal,
Fourth Appellate District
6010 State Building
San Diego, CA 92101

CLERK OF THE COURT
California Supreme Court
3580 Wilshire Boulevard
Room 213
Los Angeles, CA 90010

HON. ELI H. LEVINSON, Judge
Superior Court
225 W. Broadway
San Diego, CA 92101

I further certify that all parties required to be served have been served.

DONALD L. CLARK, County Counsel
LLOYD M. HARMON, JR., Chief Deputy

BY_____
D. RICHARD RUDOLF, Deputy
and
WILLIAM J. SCHWARTZ, JR., Deputy
Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1243

HOMER DETRICH, Director, San Diego County Department of Public Welfare,
Petitioner,

v.

SHELDON G.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DENNIS HOLZ
MICHAEL R. VALENTINE
CHARLES WOLFINGER
LEGAL AID SOCIETY OF SAN DIEGO, INC.
110 North Ditmar Street
Oceanside, California 92054
(714) 722-1336
Attorneys for Respondent

ARTS & CRAFTS PRESS, SAN DIEGO, CALIF.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1243

HOMER DETRICH, Director, San Diego County Department of Public Welfare,
Petitioner,

v.

SHELDON G.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Homer Detrich, Director of the San Diego County Department of Public Welfare ("County"), has petitioned this Court for a writ of certiorari to review a decision of the California Court of Appeal. Respondent Sheldon D. Greene ("Sheldon") requests that it deny the petition.

JURISDICTION

The Court has no jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The constitutional question raised in the Petition For Writ Of Certiorari ("Pet.") is strictly the County's creation. The Court

of Appeal simply construed the language of a state statutory provision to grant a natural father the right to seek custody of his child at a hearing brought by the County to terminate his parental rights.

STATUTORY PROVISIONS

The following state statutes form the basis of the Court of Appeal's decision: California Civil Code Sections 4600 and 7000-7017. [The text of these provisions appears in the Petition at Appendix C-2 to C-6.]

STATEMENT OF THE CASE

The opinion of the Court of Appeal adequately and correctly sets forth the background of this case. (74 Cal.App.3d 125, 127-28.) The County's statement of the case is inadequate for two reasons. First, it is so incomplete and slanted as to create a false impression of the facts. Second, its characterization of the decision as grounded in constitutional law (Pet. at 5) is transparently inaccurate.

ARGUMENT

The County contends 1) that the Court of Appeal's decision was made on federal constitutional grounds and 2) that the state court believed its ruling was compelled by *Stanley v. Illinois*, 405 U.S. 645 (1972). (Pet. at 6.)[1] An examination of the opinion

[1] Respondent's understanding of the County's contentions must be based in part upon extrapolation and conjecture. Nowhere in its Petition does the County make any specific citation to the opinion of the Court of Appeal; in fact, it refers to the opinion only twice (Pet. at 5, 6), and then only by conclusory characterizations of its import as a constitutional decision. This absence of any connection between the opinion and the County's rambling exposition of its view of federal constitutional law (Pet. at 8-10), clearly reveals that the Petition is a request for an advisory opinion. (*See, infra* at 4-6.)

shows that the decision was based only on state grounds. Even if a federal constitutional basis for the decision could somehow be found, the holding rests on an adequate and independent state ground.

I

THE COURT OF APPEAL'S DECISION RESTS SOLELY ON AN INTERPRETATION OF THE LANGUAGE OF STATE STATUTES.

The case arose in a proceeding brought by the County pursuant to California Civil Code Section 7017.[2] The issue confronting the Court of Appeal was whether an undisputed natural father, who was not a "presumed father" under Section 7004, could seek custody of his child in that proceeding. Its resolution was based on a line-by-line analysis of Section 7017 and other sections of the Uniform Parentage Act (Sections 7000-7018) ("Act").

The Court of Appeal first examined the presumptions of parentage created by Section 7004. (74 Cal.App.3d at 131-32.) This section presumes that certain men are the natural fathers of their children when factual proof of parentage is unavailable. Since the parties agreed that Sheldon is Tricia's natural father, the court noted that "natural parentage can be established without resort to any presumption." (*Id.* at 132.)

Once Sheldon's parental status was established, the court determined his right to seek custody in a Section 7017 proceeding. Its analysis centered on the text of Section 7017(d). (74 Cal. App.3d at 133-34.) The first sentence of Section 7017(d) requires that natural fathers and possible natural fathers receive notice of proceedings brought to terminate their parental rights.

[2] All statutory citations are to the California Civil Code.

The second sentence permits expeditious termination of their rights if none appears or if custody is not claimed. Sheldon, of course, both appeared and claimed custody.

The third and crucial sentence of Section 7017(d) reads:

> . . . If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. . . .

The court held that this sentence was determinative of the issue (74 Cal.App.3d at 134): "[t]he matter of custody was a proper subject for the court to consider[8]. . .". (*Id.* at 137.) Footnote 8 flatly states: "[t]he clear language of Civil Code Section 7017, subdivision (d) requires the court to determine custodial rights in this proceeding when claimed."

Having resolved the only question before it, the Court of Appeal remanded the case with directions to conduct a custody hearing pursuant to Section 4600, citing state court decisions interpreting the general standards for determining custody under that provision. No constitutional authorities were mentioned in its remand order. (74 Cal.App.3d at 137.)

Nowhere in its opinion did the Court of Appeal engage in even the most rudimentary constitutional analysis of Section 7017. The reason is obvious. It resolved the issue of Sheldon's right to seek custody solely by construing the language of Section 7017(d), without ever reaching the constitutional question the County claims was involved.

II

THE COURT OF APPEAL'S DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The County apparently contends that references to *Stanley v.*

Illinois, 405 U.S. 645 (1972) in the Court of Appeal's opinion transform it into a constitutional adjudication of Sheldon's rights under the Fourteenth Amendment. The County is attempting to fabricate a constitutional decision where none exists. Whatever weight is given the constitutional discussion in the opinion, it is clear that the decision rests on an adequate and independent state ground.

". . . [W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [the Court's] . . . jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935). *Accord, Jankovich v. Indiana Toll Road Comm'n,* 379 U.S. 487, 491-92 (1965); *Klinger v. State of Missouri,* 13 Wall. 257, 263 (1872). The policy underlying this jurisdictional limitation is ". . . found in the partitioning of power between the state and federal judicial systems . . ." and in the constitutional prohibition against rendering advisory opinions. *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945). The Court noted that it could review decisions of state courts in order ". . . to correct them to the extent they incorrectly adjudge federal rights. . . . [However,] if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (324 U.S. at 126.) In determining whether a state court's decision rests on an adequate and independent state ground, the Court looks to the "organization and language" of the opinion. *Jankovich v. Indiana Toll Road Comm'n., supra,* 379 U.S. at 491.

The organization and language of the Court of Appeal's opinion shows that the constitutional authorities cited at pages

129 and 130 (74 Cal.App.3d) were discussed only as part of the background against which the Act was proposed. The court did not state that the Act incorporated no more than the constitutional standards established by these authorities. It merely noted that its statutory interpretation was not inconsistent with those standards. In accordance with the familiar canon of statutory construction that courts will look first to the language of the statute (*United States v. Bass,* 404 U.S. 336, 339 (1972)), the court interpreted the text of Section 7017. (*See, supra* at 3-4.) That interpretation resolved the issue. The court's inquiry went no further. Thus, the nonfederal ground is "adequate" to sustain the judgment.

It is equally clear that the Court of Appeal was not constrained by *Stanley v. Illinois* to rule as it did. Its discussion of that case merely prefaced its statutory interpretation. That statutory construction was not in any sense interwoven with constitutional analysis since the opinion contains none. The state court would never have stated that the "clear language" of the Act required a custody hearing (74 Cal.App.3d at 137 n.8), if it believed the decision was compelled by *Stanley*.[3] Hence, the judgment is also "independent" of any conceivable federal ground.

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[3] In the *Stanley* context, the County cites to the Court's recent decision in *Quilloin v. Walcott,* ..... U.S. ....., 54 L.Ed.2d 511 (Jan. 10, 1978). (Pet. at 6, 9, 10.) *Quilloin* is irrelevant, as its numerous factual and legal differences from this case attest. The most important difference illuminates the misdirection of the County's arguments: the father in *Quilloin* never sought custody of his child, but only veto power over his adoption, as the Court was careful to point out. (54 L.Ed.2d at 512, 520.) Sheldon has, since the beginning of the Section 7017 proceeding, sought custody of his daughter.

CONCLUSION

Since there is no basis for the exercise of this Court's certiorari jurisdiction, the Petition should be denied.

Respectfully submitted,

DENNIS HOLZ
MICHAEL R. VALENTINE
CHARLES WOLFINGER
LEGAL AID SOCIETY OF SAN DIEGO, INC.
Attorneys for Respondent

MARCH, 1978